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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91125615
Party	Defendant THE UNIVERSITY OF SOUTH CAROLINA  ,
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

University of Southern California	)	Opposition No. 91125615
	)	
Opposer,	)	Serial No. 75/358,031
	)	
vs.	)	Mark: SC (Stylized)
	)	
University of South Carolina,	)	Filed: September 16, 1997
	)	
Applicant.	)	Published: May 18, 1999
	)	

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APPLICANT’S OBJECTIONS TO OPPOSER’S EVIDENCE

Applicant University of South Carolina (“Applicant” or “South Carolina”) hereby submits its objections to Opposer University of Southern California’s (“Opposer” or “California”) evidence in the above-captioned matter as specified below:

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## I. INTRODUCTION AND GENERAL OBJECTIONS

As the Panel is aware, Opposer submitted 41 pages of objections to Applicant's evidence. Many of these objections were directed at evidence which was of the same type, quality, and character as Opposer's own evidence. For example, Opposer repeatedly objected to Applicant's submission of newspaper articles associating South Carolina with the letters "SC" in support of Applicant's position that its use of the "SC" mark is famous. See Opposer's objections, p. 16. However, in its own submission of evidence and trial brief, Opposer submits newspaper articles and publications for the exact same purpose. See Opposer Exhibits 163-222. Similarly, Opposer object to questions concerning witnesses' individual opinions concerning likelihood of confusion, but asked these same questions. See TD-Kennedy 53:10-15. Thus, to the extent that any of Opposer's objections relating to the character of Applicant's evidence and testimony are granted, Applicant hereby objects to any of Opposer's evidence which is of a similar type and character.

## II. APPLICANT'S OBJECTIONS

### A. Opposer's Exhibit 20.1-2 (attached to Opposer's Notice of Reliance No. 1)

Opposer's Exhibit 20.1-2 purports to be an "El Rodeo" published by the "Junior Class of the College of Liberal Arts." A page of this exhibit contains a "University Monogram" consisting of a "C" surrounding an "S". (O-Ex. 20.2.) South Carolina objects to this exhibit on the following grounds:

Relevance- Opposer's Exhibit 20.2 purports to shows a "University Monogram." California offers this evidence to establish that California has used the letters "SC" as an athletic mark since this time. Applicant objects to this exhibit as irrelevant since printing a design in a yearbook does not show trademark usage on services or products sufficient to establish any

trademark or service mark rights under the Lanham Act. Moreover, there is no testimony in the record establishing that this “University Monogram” was used in connection with any athletics or educational services. Furthermore, the monogram appears to depict the letters “CS” as opposed to “SC” and therefore, it has no relevance to the marks at issue in this proceeding.

B. Opposer’s Exhibit 21.1-2 (attached to Opposer’s Notice of Reliance No. 1)

Opposer’s Exhibit 21.1-2 purports to be a Varsity Handbook of the University of Southern California published by the Young Men’s Christian Association and the Young Women’s Christian Association. South Carolina objects to this exhibit on the following grounds:

Lack of Foundation - Opposer’s Exhibit 21.1-2 is a 1907-1908 Varsity Handbook for California that Opposer has offered as evidence of use of the letters “SC” as its official athletic monogram. As an initial matter, this publication was not even created by the Opposer and thus the statements excerpted in Opposer’s brief are unreliable and they lack any sort of foundation. Specifically, there has been no testimony to indicate that the third-party publisher had any knowledge as to the athletic monogram used by Opposer.

Relevance- Because the statements did not originate with Opposer, they should not be considered as relevant on the issue of trademark usage. Moreover, there is no evidence that a university monogram was ever used in connection with uniforms or any type of education or entertainment services. Therefore, this exhibit should not be considered relevant.

C. Opposer’s Exhibit 79.2 (attached to Opposer’s Notice of Reliance No. 5)

In its brief, Opposer cites to the picture of Ray Tuff in Opposer’s Exhibit 79.2 for the proposition that California has consistently used various forms of the letters “SC” with its athletic program. South Carolina objects to this exhibit on the following grounds:

Lack of Foundation- The page consisting of Opposer's Exhibit 79.2 is taken from a book entitled *The Trojan Gallery*. No date is provided for this book. The book is written by John H. Reynolds about which nothing is known as the record is devoid of any such information. California asserts that the date of the picture of Mr. Tuff is 1904 based upon a statement in this book. However, this statement cannot be verified and there is no foundation laid to allow the fact finder to determine the veracity of this statement. As a result, this exhibit should not be relied upon by the Board.

Hearsay Within Hearsay- California has taken the position that this picture, which is undated, was taken in 1904. The basis for this statement is that the caption under the photograph describes it as such. This is a classic example of hearsay within hearsay and should be excluded under F.R.E. Rule 801.

D. Opposer's Exhibits 79, 80, 88, 89, 92, 95, 96, 98, 99, 105, 107, 108, 109 and 112 (attached to Opposer's Notice of Reliance No. 5)

California also has submitted the following exhibits which are excerpts taken from a book entitled *The Trojan Gallery*. South Carolina objects to these exhibits on the following grounds:

Lack of Foundation- Again, nothing is known about the research that went into creating this book, its photographs and its content. No date is provided for this book. The book is written by John H. Reynolds about which nothing is known as the record is devoid of any such information. Therefore, any assertions made by California supported by text contained in this book are completely lacking foundation sufficient to allow the fact finder to determine their veracity, unless there is other corroborating evidence. Compare, this with South Carolina's Freshman Rat Hat. Although the Freshman Rat Hat was discussed in the book *Remembering the Days*, South Carolina also presented evidence of its Archivist who had researched its use and

photographs of an original 1898 Freshman Rat Hat from the University of South Carolina's Archives.

Hearsay Within Hearsay- To the extent that California seeks to rely upon statements in this book, they should be considered hearsay within hearsay and should be excluded under F.R.E. Rule 801.

E. TD-Taylor 21:16-23:11; Opposer's Exhibits 328-351 (attached to TD-Taylor)

Mr. Taylor is a private investigator hired by California to visit and take pictures of collegiate merchandise in stores. South Carolina objects to this testimony and corresponding exhibits on the following grounds:

Lack of Foundation/Relevance- Opposer cites the testimony of Mr. Taylor along with Exhibits 328-351 for the purpose of attempting to show the manner in which Applicant and Opposer's merchandise is arranged in retail establishments. However, as his testimony demonstrates, Taylor failed to utilize any systematic approach in taking pictures for Opposer's counsel. Rather, it appears that Taylor traveled haphazardly around the southeastern part of the country for several days in an effort to snap photographs at random stores. There has been no evidence presented from any store owners or other reputable sources regarding the arrangement of Applicant and Opposer's merchandise. Because Taylor's methods were unreliable, his testimony lacks any serious foundation and it should be disregarded. Furthermore, the testimony and exhibits are not relevant as they do not display any serious commingling of Applicant and Opposer's goods, nor do they suggest any consumer confusion.

Failure to Seasonably Produce- Two of the last exhibits introduced into evidence at the Trial Deposition of Mr. Taylor on re-direct were pictures of a hat allegedly purchased by Mr. Taylor during his investigation. Prior to Mr. Taylor's trial deposition, California had not

produced this hat. Exhibits 350 and 351 should not be admitted as they had been in the possession of the Opposer since November 16, 2005, and were not produced to the Applicant until the date of Mr. Taylor's Trial Deposition on March 3, 2006, which was approximately four months after it came into possession of California's counsel. The hat or photographs of the hat were documents that were responsive to Applicant's Requests to Produce Nos. 3, 10, 19 and 25. South Carolina was prejudiced by this extremely late introduction into evidence (on re-direct). Moreover, Counsel for California admitted at the trial deposition that he had been in possession of the photographs for four days prior. TD-Taylor 99:11-12. As a result, Exhibits 350 and 351 should be excluded. International Minerals & Chemical Corporation v. Products Blending Corporation, 1982 TTAB LEXIS 120 at \*\*5-6, 214 U.S.P.Q. 365 (TTAB 1982) ("We see no reason to reward applicant for flouting the rules of discovery and to punish opposer for the diligent prosecution of its case.")

F. TD-Kennedy 42:22-43:5, 44:25-50:6; Opposer's Exhibits 4 – 11.2 (attached to TD-Kennedy)

Opposer cites the testimony of Ms. Kennedy along with the exhibits (which are printouts from various websites) as purported evidence of actual confusion by retailers (not consumers) between Applicant's and Opposer's marks. South Carolina objects to this testimony and corresponding exhibits on the following grounds:

Lack of Foundation- These Exhibits can be placed into three groups. The first example (O-Ex. 4.1) is of a t-shirt bearing the words "Trojans" in a license plate that was listed as a University of South Carolina t-shirt by Starstruck. The second example (O-Exs. 6, 7, 8, 9, 10, 11) were multiple copies of the same digital photographs of earrings, pendants and charms containing an interlocking "SC" listed as "South Carolina Gamecock" products. The repetition of the same text and photographs is the result of multiple websites utilizing the same few back-



end fulfillment companies for Internet retailers. (TD-Walsh 20:9-21:2.) The third example is a South Carolina hat that bears the format of the letters “SC” used by the South Carolina Baseball team from 1991 to 1997. No witness for California could explain how the web content was created. (TD-Kennedy 77:12-18; 79:15-18.) It is pure speculation for California to assert that any mislabeling was caused by retailer confusion. As asserted by South Carolina, any alleged mislabeling may have been caused by a computer glitch or incorrectly assigned SKU number. In fact, California’s own witness agreed that it was possible that this was caused by computer glitch. (TD-Kennedy 80:19-23.)

Relevance- Ms. Kennedy, the Licensing Director for California, was unaware of any confusion or complaints caused by these web pages. (TD- Kennedy 80:15-18.) Moreover, California’s third example is a South Carolina hat that bears the format of the letters “SC” used by the South Carolina Baseball team from 1991 to 1997. (See A-Ex. 145, p. 3; A-Ex. 160, p. 121; A-Ex. 146, p. 2; A-Ex. 147, p. 2; and A-Ex. 157, pp. 41, 43 showing use of this mark.) As this use was earlier than California’s use of the Athletic Interlock (adopted in 1994), this is not an example of confusion or mistake. There is not one piece of evidence suggesting that a consumer was confused or was likely to be confused by the content contained in Opposer’s Exhibits 4-11.2. As a result, these exhibits and testimony are irrelevant.

G. Opposer’s Exhibit 16.

Opposer attempted to introduce a one page summary of Team Trojan Revenue Totals. South Carolina objects to this exhibit on the following grounds.

F.R.E. Rule 1006- Exhibit 16 is a summary created by California of financial information relating to alleged product sales totals. As such, it is a summary covered under Federal Rules of Evidence, Rule 1006. Rule 1006 requires that the backing documents be

provided for examination at a reasonable time and place. These documents were apparently not provided until the day of trial. As a result, this exhibit should be excluded.

### III. APPLICANT'S OBJECTIONS TO TRIAL TESTIMONY

#### A. TD-Kennedy 39:1-40:8

Opposer attempted to elicit testimony from its licensing director concerning product design in general by companies in the field of collegiate product manufacturing. South Carolina objects to this testimony on the following grounds:

Relevance- Although the purpose of this testimony is unclear, the fact that manufactures that license marks uses similar product designs is irrelevant to this case. Any rights in these designs would be owned by the manufacture. Furthermore, the Opposer's assertion that "stitching and cuts" are similar has no bearing on this case.

Foundation- Ms. Kennedy does not deal with all manufacturers and licensees of collegiate products. Unlike, the Collegiate Licensing Corporation which represents hundreds of universities and colleges and thousands of licensees, Ms. Kennedy's knowledge is limited to those licensee's that California utilizes. Moreover, there is no evidence in the records that Ms. Kennedy inspects or has any knowledge of her own licensees' stitching, cuts or product design. (See e.g., TD-Kennedy 12:9-14:1).

Leading- The questioning is objectionable as being leading.

#### B. TD-Kennedy 43:24-44:15.

Opposer attempted to elicit testimony from its licensing director concerning Internet sales by other retailers. South Carolina objects to this testimony on the following grounds:

Foundation- Ms. Kennedy job duties do not involve internet marketing. Essentially, her knowledge is limited to the California's licensing process and to those licensee's that California

utilizes. (TD-Kennedy 8:15-12 12:9-14:1.) When asked about her experience with the sales of California's branded products sold via the Internet her answer was elusive demonstrating a lack of knowledge. (TD-West 41:10-17.) As a result, Ms. Kennedy does not have the requisite background knowledge to testify on this subject and any of her answers would be speculative.

Leading- The questioning is objectionable as being leading.

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October 9, 2006

## CERTIFICATE OF SERVICE

The undersigned of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Applicant do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by e-mailing a copy of same and by mailing a copy of the same by United States Postal Service First Class Mail, with proper postage thereon, to the following address(es):

Pleadings: **APPLICANT'S OBJECTIONS TO OPPOSER'S EVIDENCE**

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